

No. 11948

United States
Circuit Court of Appeals
For the Ninth Circuit.

ANDREW L. JOHNSON and CHARLES W.
GUNSTONE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

FILED

JUL -2 1948

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

Attorneys for Appellant:

MESSRS. RYAN, ASKREN AND
MATHEWSON,

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Seattle 1, Washington.

Attorneys for Appellee:

MESSRS. J. CHARLES DENNIS &
FRANK PELLEGRINI,

1017 U. S. Court House,
Seattle 4, Washington. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 1746

ANDREW L. JOHNSON and CHARLES W.
GUNSTONE, d/b/a JOHNSON & GUN-
STONE, a co-partnership,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

Come now the plaintiffs by their attorneys, Ryan,
Askren & Mathewson, and for complaint against the
defendant, allege as follows:

I.

This is an action brought under and by virtue of
Title IV of the Legislative Re-organization Act of
1946, Public Law 601, 6 U.S.C. Congressional Serv-
ice 778, as hereinafter more fully appears.

II.

The plaintiffs herein are individuals doing busi-
ness as a co-partnership, and the said plaintiffs are
residents of Jefferson County, in the State of
Washington.

III.

The plaintiffs herein are owners of certain tide-
lands and tideflats located at Discovery Bay, in the

State of Washington, and the said plaintiffs at the present time, and for many years, have conducted a commercial clam farm on the said tidelands; that the said plaintiffs have expended a large sum of money in the acquisition and development of the said clam farm, and have over the past several years developed an extensive trade in the [2] harvesting and marketing of clams from the said tidelands.

IV.

That on or about the first day of December, 1945, the United States Navy anchored approximately twelve (12) large United States naval vessels in the waters of said port, Discovery Bay, adjacent to the above described lands of the plaintiffs; and that the said vessels remained there for many weeks thereafter.

V.

The personnel, men and officers of the United States stationed upon said vessels did wilfully or negligently discharge sewage, oil and other noxious and waste materials into the said port, Discovery Bay, thereby grossly polluting the waters of said bay, and polluting the plaintiff's clam lands, which pollution made the clams thereupon unfit for human consumption. That as a result of the afore-said pollution, the Department of Health of the State of Washington on the tenth day of December, 1945 issued an order prohibiting the taking of clams from the plaintiffs' lands for sale to the public, which order continued in full force and effect until after the expiration of the plaintiffs' clam digging

season, which terminated on or about the 31st of March, 1946.

VI.

That as a result of the aforesaid pollution and the order issued by the State of Washington, which was occasioned by said pollution, the plaintiffs were prevented from digging and marketing their clams for the period between the tenth of December, 1945, and the thirty-first of March, 1946. The plaintiffs thereby lost profits from the sale of said clams in the amount of Twenty-four Thousand (\$24,000.00) Dollars. [3]

VII.

As a direct result of the plaintiffs being prevented by said pollution from fulfilling the orders of their customers, the plaintiffs have lost many of the customers to whom they formerly sold clams, and their business has been permanently damaged thereby in the sum of Twelve Thousand (\$12,000.00) Dollars, and the plaintiffs' clam lands, as a result of said pollution, have been permanently damaged in the sum of Ten Thousand (\$10,000.00) Dollars.

Wherefore, the plaintiffs pray that they be awarded judgment against the defendant in the sum of Forty-six Thousand (\$46,000.00) Dollars, plus their costs and disbursements herein expended and plus their attorneys' fees as allowed under Title IV of the Legislative Re-organization Act of 1946, Public Law 601, 6 U.S.C. Congressional Service 778.

RYAN, ASKREN &
MATHEWSON,
Attorneys for Plaintiffs.

State of Washington,
County of King—ss.

Andrew L. Johnson, upon oath deposes and says:
That he is one of the plaintiffs in the above entitled action, that he has read the foregoing complaint, knows the contents thereof, and believes the same to be true.

/s/ ANDREW L. JOHNSON.

Subscribed and sworn to before me this 7th day
of February, 1947.

/s/ WILLIAM J. MADDEN,
Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed March 3, 1947. [4]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, United States of America, by and through J. Charles Dennis, United States Attorney for the Western District of Washington, and Frank Pellegrini, Assistant United States Attorney, acting under the direction of the Attorney General of the United States and at the request of the Navy Department of the United States and for answer to the complaint herein admits, denies and alleges as follows:

I.

Defendant denies each and every allegation of

paragraphs I, II, III, IV, V, VI and VII, and specifically denies that the plaintiffs have been damaged in the sum of \$46,000.00 or any other sum whatsoever.

Wherefore, having fully answered the complaint herein, the defendant prays that this action be dismissed and that it recovers its costs and disbursements herein to be taxed.

J. CHARLES DENNIS,

United States Attorney.

FRANK PELLEGRINI,

Asst. United States Attorney.

Attorneys for Defendant.

Copy Received 7/21/47.

RYAN, ASKREN &

MATHEWSON,

Atty's for Plaintiff.

[Endorsed]: Filed August 11, 1947. [5]

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes Now the defendant and moves the Court for an order to dismiss the above entitled cause on the ground and for the reason that the Court does not have jurisdiction of the said cause pursuant to the provisions of Sections 931 and 943, Title 28, U.S.C., (Tort Claims Act).

This motion is based upon the files and records herein and upon the affidavits of Carl H. Wehr,

Lieutenant, United States Navy; William F. Lally, Commander, U.S.M.R.; and Samuel J. Reiffel, Commander, U.S.M.R., wherein in said affidavits it is shown that the vessels of the United States Navy anchored in Port Discovery Bay for the periods described in the complaint on file herein were engaged in combatant activities during time of war and the Court therefore does not have jurisdiction of the cause of action asserted in the complaint on file herein for damages, if any, arising out of the anchorage of said vessels in said bay.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ FRANK PELLEGRINI,
Ass't United States Attorney.

Copy received 4/14/48.

RYAN, ASKREN &
MATHEWSON,
Atty's for Plaintiffs—E H.

[Title of District Court and Cause.]

AFFIDAVIT OF LIEUTENANT CARL H.
WEHR, U. S. NAVY

District of Columbia—ss.

I, Carl H. Wehr, being first duly sworn, depose and say:

That I am a Lieutenant in the United States Navy, and at present am stationed with the Bureau

of Ordnance, Navy Department, Washington, D. C., in connection with Ordnance Logistics; that from January 30, 1945 until the middle of March, 1946, I was assigned to the staff of the Commander, Western Sea Frontier, Logistics Division, Ordnance Control Branch, and that the specific duty to which I was assigned was Assistant Officer-in-Charge of Ordnance Control. In general, all matters affecting ordnance logistics in the Central Pacific theater were well-known to me during this period, either by reason of orders and reports originating in my office or because of orders concerning ordnance logistic matters which came to my official notice.

That in the month of September 1944, due to the increase in the tempo of the war in the Pacific, and its being carried to the mainland of Japan, it became apparent that additional facilities for supplying ammunition to combat ships would be necessary. This matter was the subject of numerous dispatches between the Chief of [7] Naval Operations and the Commander-in-Chief of the Pacific and Pacific Ocean Areas. As a result of this need for increased ammunition supply facilities, a circular letter was issued by the Chief of Naval Operations dated 5 October 1944, a true copy of which is attached hereto and, for identification, marked "Exhibit (A)." Pursuant to the terms of this letter, ten ships then in the process of completion at Richmond, California shipyards were made available by United States Maritime Commission to the United States Navy, for commissioning as naval vessels and for use as ammunition supply ships. These addi-

tional vessels, as indicated in Exhibit (a), were urgently required for the transportation of ammunition to forward areas in the Pacific theater. Delivery "as is" was to be accepted. Because of the urgent need for the vessels, no conversion was authorized. Ordinarily, an ammunition ship of the United States Navy would be fitted with special racks and other types of stowage facilities for bombs, shells, and other types of ammunition, but in all ten ships mentioned in Exhibit (A), only the essential armament was added before shakedown and loading. These ten ships were allocated to the Commander-in-Chief, Pacific and Pacific Ocean Areas, to augment the then presently available ammunition ships assigned to the service of supply of various task forces and fleets engaged in combat operations.

As it became necessary for combat ships to rearm, they would proceed to the ammunition ships for this purpose. As a rule, such ammunition ships would rendezvous at a point less than one day's sailing time from the actual combat front. However, when occasion required, ammunition ships would be ordered to and did [8] rearm combat ships within a combat area or in enemy waters and, in such instances, it was not uncommon for ammunition ships to be within the range of enemy aircraft. As a result of this method of the supply of ammunition, as well as fuel, food, and other items, a task force was enabled to stay at sea and continue combat operations in enemy waters for as long as 60 to 70 days.

There are two principal methods of loading am-

munition ships in the United States Navy. The first of these methods is called "Fleet Issue" loading. This is a method of selective loading so that any combat ship of the United States Navy can procure any type and quantity of ammunition which she requires from the "Fleet Issue" ammunition ship without disturbing the remaining cargo. A ship loaded in this manner has been described as a "floating magazine." The other general type of loading is termed "block" loading. This is the method of loading used to transport large quantities of ammunition overseas for unloading at a land base, and for re-issue from such point. The sixteen ships later anchored in Port Discovery Bay, and to which reference is hereinafter made, were loaded in such a manner that they could rearm combat ships directly at sea, with a minimum loss of time under combat conditions.

At the cessation of actual hostilities in the Pacific, it was necessary to dispose of large amounts of ammunition then aboard ammunition ships in the area. All ammunition ship loadings were terminated. The Navy Department, acting through the Bureau of Ordnance, immediately commenced arrangements for the return and disposal of excess ammunition. There were at that time approximately 55 ammunition ships located in the forward area loaded with ammunition for the fleet and advance bases. About one-half of these vessels were operated by the War Shipping Administration. Due to the urgent need for the redelivery of these ships to private [9] operators, the first consideration was

the return of these vessels to continental ports, in order that crews could be discharged and the ships returned to their owners. In many cases merchant seaman's contracts had expired on board, and the inability to retain the crews aboard vessels in such cases after their return, precluded the retention of these ships at an explosive area, as a result of which a hazardous condition would be created in the harbor where such vessels would be anchored. At that time, that is, at the end of actual hostilities, the ammunition cargo aboard ammunition ships remaining after a portion of the cargo had been discharged, was consolidated in order to return fully loaded ships to the West Coast of the United States. Comparatively limited facilities capable of handling hazardous cargo existed in order to accommodate such a large number of vessels. For the reasons indicated above, the privately owned War Shipping Administration vessels were assigned first priority at ammunition terminals. During the last quarter of 1945 and the first quarter of 1946, the facilities at the Naval Magazines, Port Chicago, California, and Bangor, Washington, were operated to capacity. These two facilities, plus small tonnages discharged at an explosive anchorage in San Francisco Bay, accommodated about 80% of the ammunition ships. In order to prevent the further hazarding of already congested port areas, sixteen of the government-owned ammunition ships were placed in an ammunition "bank" in Port Discovery Bay, Washington, until discharging facilities became available. Eight of these ammunition ships so

anchored in Port Discovery Bay, Washington, are vessels referred to in the above-mentioned letter of the Chief of Naval Operations, Exhibit (A). [10]

These ships are as follows:

Provo Victory (AK-228)
Las Vegas Victory (AK-229)
Manderson Victory (AK-230)
Bedford Victory (AK-231)
Mayfield Victory (AK-232)
Newcastle Victory (AK-233)
Bucyrus Victory (AK-234)
Red Oak Victory (AK-235)

The eight remaining ships are as follows:

Alamosa (AK-156)
Antigone (AGP-16)
Lassen (AE-3)
Mazama (AE-9)
Pyro (AE-1)
Shasta (AE-6)
Mt. Baker (AE-4)
Autauga (AK-160)

As indicated above, these sixteen vessels were an essential component of the combat fleet in the conduct of the war against the Japanese government, and were directly connected with the successful operations of the Pacific Fleet of the United States Navy. All of these sixteen ships were fully commissioned vessels of the United States Navy at the time of their operations in the Western Pacific, and they so continued to be while anchored in Port Discovery Bay upon returning from the Pacific.

They had all been engaged in logistic support of combat operations. While they remained in Port Discovery Bay, they continued to be in the same physical condition, fully able to perform the same type of mission, as when engaged in operations in the Pacific. During the time of their retention in the ammunition ship "bank," and until such time as they were unloaded, they were in all respects in a full condition of readiness as a "floating magazine" of the United States Navy.

Dated at Washington, D. C., this 15th day of August, 1947.

CARL H. WEHR.

District of Columbia—ss.

Before me, a Notary Public in and for the District of Columbia, personally appeared Carl H. Wehr this 15th day of August, 1947, and, being first duly cautioned and sworn, acknowledged that he executed the foregoing affidavit, and that the facts contained therein are true to the best of his knowledge and belief.

[Seal] HERBERT A. ENGLER,

Notary Public.

My Commission expires January 1, 1951. [11]

EXHIBIT "A"

Navy Department
Office of the Chief of Naval Operations
Washington 25, D. C.

Op 39A-mgc	101044
Serial 0105739	
(SC)QS1/L4	40001

5 October, 1944

Airmail

From: Chief of Naval Operations

To: All Bureaus, Boards and Offices, Navy Department Commandant, Twelfth Naval District

Subj: Acquisition of ten (10) VC2-S-AP2 design Victory cargo ships for AK 227-236.

Refs:

(a) Aux. Ves. Bd. Report No. 96.

(b) CinCPOA sec dis 230739 (Sep) to CNO.

(c) CNO conf ser 0102939 of 27 Sep '44 to MC.

(d) CNO conf dis 302150 (Sep) to Com-Twelve.

1. In accordance with ref (b) and as requested by ref (c), the Maritime Commission has designated the S/S Bouler Victory (MCV 536) as the first of ten new Victory cargo ships to be made available to the Navy upon their completion and has tentatively indicated that nine other vessels, in addition to MCV 536, all building by Permanente Metals Corp. Shipbuilding Division (Permanente Shipyard # 1), Richmond, California, will also be assigned:

Name	MCV #	Est. Del.	Class No.
Boulder Victory	536	8 Oct.	AK 227
Provo Victory	537	16 Oct.	AK 228
Las Vegas Victory	538	24 Oct.	AK 229
Manderson Victory	539	30 Oct.	AK 230
Bedford Victory	540	6 Nov.	AK 231
Mayfield Victory	541	12 Nov.	AK 232
Newcastle Victory	542	18 Nov.	AK 233
Bucyrus Victory	543	24 Nov.	AK 234
Red Oak Victory	544	30 Nov.	AK 235
Lakewood Victory	545	6 Dec.	AK 236

2. These ten vessels are urgently required for the transportation of ammunition to forward areas in the Pacific. Delivery of these vessels "as is" is therefore acceptable provided they are complete in all respects, both hull and machinery including all available spare parts and equipment applicable to the vessels. Spares should be in accordance with A.B.S. minimum requirements.

3. In addition to MCV 536 covered by ref (d), the Commandant is also authorized when their assignment to the Navy is approved by the Commission, to accept delivery of MCV537-345 incl., on a loan basis.

Classification of this correspondence changed to Unclassified.

Authority CNO serial 9034P32

Date 19 June 1947

W. H. NUTT. [12]

4. Due to the urgent need for subject vessels and in view of CinCPOA's recommendations, no conversion is authorized. However, BuShips is requested to provide for appropriate outfitting. Armament: 1-3"/50DP, 1-5"/38DP and 8-20 mm guns.

5. BuPers is requested to furnish the necessary naval crews to man these vessels including ship experienced winch operators and cargo handlers. Crew is limited by existing berthing and messing facilities and no attempt should be made to conform to a prescribed complement for similar size auxiliaries. In view of the Commission's desire and to identify these vessels, the Bureau is requested to recommend retention of the names already assigned by the Maritime Commission.

6. Upon receipt of sufficient personnel, ComTwelve is directed to place subject vessels in full commission classified as Cargo Ships (AK) and numbered AK 227-236, respectively.

7. Upon completion of outfitting, the Commandant is requested to direct AK 227-236 to report by dispatch to CominCH, CinCPac and COTCPac for duty making CNO, ComServPac and SubComServPac information addressees. Instructions for loading AK 227 have been issued SubComServPac by CinCPac.

8. Ultimate assignment of AK 227-236 is to Service Force, Pacific Fleet.

9. Report time and date vessels are accepted and commissioned by plain language deferred dispatches to CNO.

F. C. HORNE,

Vice Chief of Naval Operations

W. W. SMITH,

By direction

Authenticated:

/s/ W. N. MANSFIELD,

Commander, USNR

Copies to:

CominCH	ComFwdAreaCenPac
CinCPOA	Co CenComDet West Coast
CinCPac	CO PreComTraCen San Fran
ComServPac	Comdt NY MI
SubComServPac	AstIndMan San Fran
COTCPac	CO ArmGdCen San Fran
ComSeron 10	BuShips Lias Offer (San Fran)
ComPhibPac	PD San Fran
Com3rdFlt	NSD Oakland
Com5thFlt	Mar Comm (10)
ComELEVEN	Reg Dir Constr MC—West Coast
ComFOURTEEN	Reg Dir Constr MC—West Coast

In the Matter of

THE ALLEGED POLLUTION OF CLAM
FARMS AT PORT DISCOVERY BAY BY
USS BUCYRUS VICTORY ET AL.

State of New York,
County of Kings—ss.

William F. Lally being duly sworn deposes and
says:

I am a commander in the United States Naval Reserve, and was commanding officer of the USS Las Vegas Victory (AK229) from her commissioning on 25 October 1944 until she was decommissioned on 8 April 1946.

The USS Las Vegas Victory was an ammunition ship. She was loaded at the ammunition depot at Beaver, Oregon, and departed on or about 26 November 1944 for combat areas in the western Pacific. She was attached to Commander Service Squadron Ten at Ulithi, engaged in re-arming various combat ships.

The ship was engaged in the operations against Okinawa Gunto, and re-armed combatant units at Kerama Rnetto. She was also engaged in re-arming operations at sea.

On 15 August 1945 (V.J. Day) the ship was at Eniwetok, engaged in consolidating ammunition cargo with other ships preparatory to the planned attack against the Japanese mainland.

The ship left Eniwetok on 7 November 1945 under orders from Commander Service Force Pacific Fleet for Seattle. Shortly after leaving Eniwetok, there developed a serious leak in the stern tube gland. I thought it might be necessary to put into Midway or Pearl Harbor for repairs, but my Chief Engineer assured me that there was no danger, and I decided to continue on to Seattle.

We received a despatch en route from Commander Western Sea Frontier to pick up a pilot at Port Angeles and proceed to an anchorage in Port Discovery Bay. We picked up a pilot at Port Angeles (a Lieutenant Commander in the Coast Guard). He had an anchorage chart of Port Discovery Bay, and said he had instructions to anchor us in Berth Easy. We anchored in Port Discovery Bay on the morning of 19 November 1945.

My recollection is that the ship had about 3500 tons of ammunition aboard. During our stay at Port Discovery Bay, I attended a conference with my ammunition cargo officer at the Naval Ammunition Depot at Bangor, Washington. At this conference [14] we submitted an inventory of our ammunition cargo, answered questions as to what was

original issue, what we had received from other ammunition ships, and what had been returned to us from combatant ships. The purpose of this conference was to determine whether the ship's cargo should be discharged at Bangor, Washington; Port Chicago, California; Earle, New Jersey; or some other point.

It was intimated at the conference that our ammunition was not suitable for discharge at Bangor, Washington. I then requested the Assistant Industrial Manager at Seattle to repack the leaky stern tube gland, as it was unsafe to make a voyage to any of the other ports where we would have to discharge our cargo. A repair ship and divers were sent down and the stern tube gland repacked. I believe the Red Oak Victory had a stern tube packed at Port Discovery Bay at or about the same time. My recollection is that this occurred in December 1945.

On 15 February 1946 pursuant to orders of Commander Western Sea Frontier dated 13 February 1946 we left Port Discovery Bay bound for San Francisco, and discharged our cargo of ammunition at Port Chicago between 27 February and 14 March 1946.

/s/ WILLIAM F. LALLY.

Subscribed and sworn to before me this 24th day of April, 1947.

[Seal] JESSE S. JACOBS,

Notary Public, State of New York. Residing in
Kings Co. No. 38, Reg. No. 49-J-8.

Commission expires March 30, 1948. [15]

No. 494

State of New York,
County of Kings—ss.

I, Francis J. Sinnott, Clerk of the County of Kings, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, having a seal, Do Hereby Certify, That Jesse S. Jacobs, whose name is subscribed to the deposition, certificate of acknowledgment or proof of the annexed instrument, was at the time of taking the same a Notary Public in and for the State of New York, duly commissioned and sworn and qualified to act as such throughout the State of New York; that pursuant to law a commission, or a certificate of his appointment and qualifications, and his autograph signature, have been filed in my office; that as such Notary Public he was duly authorized by the laws of the State of New York to administer oaths and affirmations, to receive and certify the acknowledgment or proof of deeds, mortgages, powers of attorney and other written instruments for lands, tenements and hereditaments to be read in evidence or recorded in this State, to protest notes and to take and certify affidavits and depositions; and that I am well acquainted with the handwriting of such Notary Public, or have compared the signature on the annexed instrument with his autograph signature deposited in my office, and believe that the signature is genuine.

In Witness Whereof, I have hereunto set my

and affixed the seal of the said Court and County this 24th day of April, 1947.

[Seal]

FRANCIS J. SINNOTT,
Clerk. [16]

[Title of District Court and Cause.]

AFFIDAVIT OF COMMANDER SAMUEL J.
REIFFEL, USNR

Territory of Hawaii,
City of Honolulu—ss.

Samuel J. Reiffel, being first duly sworn, deposes and says as follows:

I am a Commander in the United States Naval Reserve, and was Commanding Officer of the USS Pyro (AE-1) from the time she entered Port Discovery Bay, Washington, on 21 November, 1945. After Commander J. E. Wade was hospitalized on or about 29 November, 1945, I assumed the duties of Senior Officer Present Afloat.

Prior to proceeding to Port Discovery Bay, the USS Pyro was attached to the Seventh Fleet in the Western Pacific and was operated in the Admiralty Islands, in New Guinea, and in the Philippines. At these places the Pyro was engaged in combat operations consisting of issuing ammunition to ships in and around Leyte Gulf; San Jose, Mindora; Zamboango, Mindanao; and Subic Bay, Luzon. The mission of my ship in re-arming combatant ships in the combat area was an essential part of

war activity. Following these operations, my ship was ordered to Manus Island in the Admiralty Islands for necessary repairs, thence to Eniwetok in the Marshall Islands. At that point, orders were received to proceed to Seattle, but en route to Seattle, further orders were received to proceed and anchor in Port Discovery Bay. [17]

To the best of my knowledge and information, all other Navy ammunition ships present in Port Discovery Bay during the period from 21 November, 1945, until March, 1946, had returned from the Western Pacific, from duties of a similar character; that is, re-arming combat ships, both at sea and at anchor. Upon returning to this country, the first anchorage of the USS Pyro within the territorial limits of the United States was at Port Discovery Bay with the sole exception of a brief medical inspection for tropical diseases and other matters. No ammunition was unloaded by the USS Pyro subsequent to the active combat fleet operations above mentioned until after this ship left Port Discovery Bay, on 15 February, 1946.

The purpose of ordering these Naval vessels from the Pacific to Port Discovery Bay and the presence of the ships in Port Discovery Bay was in connection with combatant activities. These Naval vessels were held in Port Discovery Bay pending a decision concerning where to dispose of the cargoes of ammunition carried aboard each Naval vessel. To the best of my knowledge, after the decision regarding the disposal of the ammunition which had been stored aboard the vessels for use in

combatant activities was reached, all Naval vessels left Port Discovery Bay and went to various places where the ammunition was unloaded and placed in storage or otherwise disposed of.

During the period of time the ship was in Port Discovery Bay, the personnel aboard were for the most part the same as those aboard while in the Pacific area, with the exception of the men who were released to inactive duty. The armament and equipment of the ship had not been changed since leaving the combat areas of the Western Pacific.

The USS Pyro was commissioned in the United States Navy on 1 July, 1939, and was decommissioned on 12 June, 1946.

As the Senior Officer Present Afloat, it was my responsibility to pass on to all commanding officers of all United States Naval ships in Port Discovery Bay the orders of the Thirteenth Naval District. A copy of Thirteenth Naval District order dated 15 November, 1945, attached hereto and marked Exhibit "A," was received by me [18] according to the provisions of paragraph 5. These orders were the basic orders governing our anchorage, and, to the best of my knowledge, provisions of this order were observed by all commands during the period my ship was present at Port Discovery Bay.

According to the best information available to me at this time, the following were the ships anchored in Port Discovery Bay during the period in which I was acting as Senior Officer Present Afloat:

Alamosa, AK-156; Bedford Victory, AK-231; Bu-

cyrus Victory, AK-234; Lassen, AE-3; Las Vegas Victory, AK-229; Manderson Victory, AK-230; Mayfield Victory, AK-232; Mazama, AE-9; New Castle Victory, AK-233; Provo Victory, AK-228; Pyro, AE-1; Red Oak Victory, AK-235; Shasta, AE-6.

After my ship departed from Port Discovery Bay on 15 February, 1946, the Senior Officer Present Afloat was Commander Henry R. Shufeldt, the Commanding Officer of the USS Lassen (AE-3).

/s/ SAMUEL J. RIEFFEL.

Territory of Hawaii,
City and County of Honolulu—ss.

Before me, a Notary Public in and for the City of Honolulu, Territory of Hawaii, personally appeared Samuel J. Reiffel this 13th day of June, 1945, and, being first duly cautioned and sworn, acknowledged that he executed the foregoing affidavit, and that the facts contained therein are true to the best of his knowledge and belief.

[Seal] /s/ CLAYTON A. HOFFMAN,
Notary Public.

My commission expires April 24, 1950. [19]

Territory of Hawaii,
City and County of Honolulu—ss.

I, Maydeen I. Fuller, Clerk of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, the same being a Court of Record and having a seal, do hereby certify that Clayton A. Hoffman before whom the foregoing acknowledgment was taken,

was at the time of taking the same, a Notary Public duly commissioned and sworn for the First Judicial Circuit of the Territory of Hawaii and duly authorized by the laws of said Territory to take and certify acknowledgments or proofs of deeds of land, etc., in said Territory in the manner aforesaid; that I am well acquainted with the handwriting of said Clayton A. Hoffman and verily believe that the signature to said certificate of acknowledgment is genuine. And further, that said acknowledgment was taken in accordance with the laws of the Territory of Hawaii; that I have compared the impression of the seal affixed thereto with a specimen impression thereof deposited in my office and that I believe the impression of the seal upon the original certificate is genuine.

In Testimony whereof I have hereunto set my hand and affixed the seal of said court at Honolulu aforesaid this 13th day of June, 1947.

[Seal] MAYDEEN I. FULLER,
Clerk, Circuit Court, First Judicial Circuit, Territory of Hawaii. [20]

Copy

EXHIBIT "A"

15 November 1945

From: Commandant, Thirteenth Naval District
Officer-in-Charge of Ammunition Ships Awaiting Discharge in Thirteenth Naval District.

Subject: Officer-in-Charge of Ammunition Ships
Awaiting Discharge in Thirteenth Naval District, Instructions.

1. You are directed to take command of the anchorage areas provided for vessels Navy or Navy operated returning from forward areas loaded with ammunition, awaiting opportunity to discharge their cargoes of explosives. You are charged with the execution of safety precautions pertaining to the safe guarding of the ammunition ships while they are within the limits of the anchorage.

2. There have been established two (2) anchorages designated for the purpose of anchoring vessels with returned ammunition; one at Discovery Bay off the Straits of San Juan De Fuca, and one at Holmes Harbor, Whidby Island off Saratoga Passage. Discovery Bay will be the area used first. In these areas, anchorages have been indicated consecutively numbered, each anchorage having a diameter of 600 yards or 2000 yards, as shown by the charts attached hereto. Vessels loaded with ammunition subject to enmasse detonation, such as classes VII, IX, X, and XI Naveg-108 Revised regulations, must be anchored singly at least 2000 yards apart, if ammunition cargo exceeds 3000 tons. Ships loaded with ground force ammunition or having ammunition cargoes less than 3000 tons may be berthed 1200 yards apart.

3. The purpose of your orders is to safeguard the vessels laden with explosives during the period which may be required to maintain them in this district before they may be assigned to an [21] unloading pier or diverted to other naval districts. To accomplish these duties you will be furnished with men and equipment from the Small Boat Pool of 13th Naval District and from the U. S. Coast Guard

13th Naval District. The specific duties of these detachments will be indicated herein.

4. You will be informed by the Port Director, 13th Naval District, of the expected arrival of any vessel for berthing in the anchorage area.

5. Before entering either anchorage area, the Commanding Officer of each U. S. Naval vessel or master of each commercial vessel will be given copies of these orders of the Commandant specifying the general safety duties which must be performed by such commanding officer or master, and will be directed to report to the Officer-in-Charge and to comply with these instructions.

6. The U. S. Coast Guard will maintain picket boats, one for each explosive area, manned at all times, for the purpose of carrying out the following specific duties:

- a. Upon the approach of an explosive laden vessel, the Coast Guard picket boat will convoy such vessel to its anchorage, assigned by the Officer-in-Charge. The Coast Guard unit on the picket boat will be responsible for the exact location of each vessel within its assigned anchorage.
- b. The picket boat will have the additional duty of warning all vessels of 100 tons or over, gross register, as they approach the harbors, of the danger of entering the explosive area.
- c. The picket boat will be at the command of the Officer-in-Charge and will be used for emergencies and for the purpose of inspections as later detailed. [22]

7. There will be assigned from the Small Boat Pool of the 13th Naval District, craft and personnel for each explosive anchorage whose duties under the Officer-in-Charge will be:

- a. To man suitable fire boats or barges which will be supplied to them by the 13th Naval District, one boat to be located in each explosive anchorage area. The fire boats will be manned at all times by thoroughly experienced crews capable of operating the vessels under fire fighting conditions.
- b. To furnish such other small boats and personnel to man them as may be necessary to supplement the small boats available from vessels at anchor in order that delivery of supplies and landing of liberty parties be adequately accomplished.
- c. To maintain tugs, to be supplied by the 13th Naval District suitable for the purpose of assisting in moving promptly any of the fully laden vessels from within the limits of the anchorage to a point of safety beyond the area.

8. It is expected that there will be two (2) classes of vessels at anchor within the area which will be placed under the direction of the Officer-in-Charge of Ammunition Ships Awaiting Discharge and which will be directed to comply with the safety regulations required by the U. S. Coast

Guard, hereto attached and made a part of these orders:

a. The first class of vessels may be U. S. Auxiliary vessels fully manned whose commanding officers will be ordered to render such assistance and use of personnel as the Officer-in-Charge may consider necessary for the efficient maintenance of safety precautions directed to be carried out by these general instructions.

b. The second category of vessels to be anchored may be merchant [23] vessels so manned that they are capable of getting under way prompt in the event of emergency. Those vessels will be practically fully manned and the master of each will be directed to furnish such men and material which the Officer-in-Charge may require for the carrying out of these general safety provisions.

9. All vessels within the anchorage shall make distress or emergency signals by the continuous rapid ringing of the ship's bell and in addition in the daytime by the display of the international Ship's flag distress signal and at night by the Very pistol signals. Fog signals on all vessels shall be sounded in accordance with pilot rules.

10. The Officer-in-Charge shall cause an inspection to be made in each eight (8) hour period of the day of every ship within the anchorage, of the fol-

lowing particulars and their compliance with the special safety precautions:

- a. The alertness of the anchor watch on each vessel.
- b. Each vessel's anchor gear in relation to its readiness to be let go in case of emergency and the possibility of the anchor dragging in weather.
- c. A towing hawser on all vessels within the anchorage laid out for immediate use with one end secured and the eye-end laid overboard for use by tugs for towing.
- d. Accomodation ladders rigged on all vessels at all times and on the opposite side each vessel a Jacob's ladder swung over the side to the water's edge.

11. Smoking shall be allowed on vessels in anchorage only in areas designated by the Officer-in-Charge. [24]

12. No liquor nor drugs shall be permitted aboard vessels within the anchorage other than such within the custody of organized departments.

13. No visitors shall be allowed aboard vessels in anchorage.

14. The provisions of the Oil Pollution Act shall be rigidly followed.

15. The Officer-in-Charge shall take such other precautions which he considers proper for the safety of the vessels within the anchorage.

16. The responsibility of the Officer-in-Charge shall cease in regard to individual vessels when each have been removed from the specified limits of the anchorages.

RANDALL JACOBS,
Rear Admiral, USN,
Commandant, 13th ND.
E. P. ABERNETHY,
By direction.

Copy to:

DCGO, 13th ND

All ships involved

Boat Pool Officer, 13 ND

[Endorsed]: Filed April 14, 1948. [25]

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 1746

ANDREW L. JOHNSON and CHARLES W.
GUNSTONE dba JOHNSON & GUNSTONE,
a Co-Partnership,

Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Before: The Honorable John C. Bowen,
District Judge.

Seattle, Washington

April 26, 1948, 10:00 o'clock a.m.

COURT'S DECISION ON MOTION TO DISMISS

The Court: The fact that a battle was not being waged on the day or days when this damage was caused seems to the Court to be not determinative of this issue as to whether or not these vessels were being employed in combatant service at the time. If there was a prospect of need of these vessels either in a battle not yet ended or in one that might soon be started, it would seem to me that such status meets the condition of exemption stated in the statute exempting as it does liabilities arising through the conduct of war combat activities; that is the effect, I believe, of the exemption.

The Court feels that in this instance, as in all others, it is the duty of the Court to require a showing [26] of jurisdiction by the party suing,—in this instance that the cause of action is one as to which the United States government has consented to be sued. That is not clearly shown here.

On the other hand, the Court is convinced on the facts disclosed in particularly the affidavit of Samuel J. Reiffel that these vessels causing the alleged damage were while causing it engaged in combatant service and activities reasonably connected with the Japanese war which was not then officially ended.

One reason the Court is of that opinion is that it is well known that not only is the first line of de-

fense in a particular battle a combatant activity but also the necessary supporting services are just as much so in their nature. Were it not for the supporting services, such as supply ships and ammunition carriers, the battle could not last long. And as long as there is any necessity for obtaining an unbroken line of ammunition supply to the war combatant vessels and a ship such as those ships named here is engaged in supplying that ammunition, the Court has no alternative other than to find that such activity of the supplying vessel, although held at anchorage some distance from the point at which the ammunition may be fired at the enemy, is engaged in combatant service within the statutory exemption of combatant activities respecting which the government has not consented to be sued.

The motion to dismiss should be and is granted. The action of the defendant, pursuant to the ruling of the Court on the motion to produce, may be suspended pending the entry of a proper order on this motion to dismiss, [27] at which time the Court may have more to say on what further should be done, if anything, by the defendant pursuant to the Court's announced ruling on the motion to produce.

Mr. Madden: Just one thing, if Your Honor please. Your Honor said there was no showing by the plaintiff. I assume this is one of those things where the facts are obvious and it is more or less of Your Honor's interpreting.

The Court: Did I use the word "no showing"? I meant "no sufficient showing." Such showing as was made by the plaintiff was insufficient to con-

vince the Court that there was jurisdiction in the Court to maintain this action.

Does that meet your inquiry? If it does not, I will try to expand it more, Mr. Madden.

Mr. Madden: No. I mean there was no dispute as to the facts in regard to where the ships were.

The Court: And by those facts, so much of them as are set forth by the plaintiff, the Court is not convinced that the action is one which is cognizable under the Tort Claims Act, for the reasons which the Court has discussed.

Concluded.

[Endorsed]: Filed April 28, 1948. [28]

[Title of District and Cause.]

ORDER OF DISMISSAL

This matter coming on for hearing on defendant's motion to dismiss the action herein, the plaintiff being represented by Ryan, Askren & Mathewson and William J. Madden, the defendant being represented by J. Charles Dennis, United States Attorney, and Frank Pellegrini, Assistant United States Attorney, and the Court having heard the arguments and having considered the said motion and the uncontradicted affidavits submitted in support thereof, and it appearing to the Court from the pleadings and the said motion that the United States of America was engaged in war at the times of the occurrence of the events alleged in the complaint on

file herein and that the said claim sued on arises out of the combatant activities of the United States Navy and that the Court does not have jurisdiction of the subject matter of the action herein, and the Court being fully advised in the premises, now, therefore, it is

Ordered and Adjudged that the defendant's motion to dismiss be and it is hereby granted and the action be and it is hereby dismissed.

Done in open court this 3rd day of May, 1948.

JOHN C. BOWEN,
United States District Judge.

Presented by:

FRANK PELLEGRINI,
Assistant United States At-
torney.

Approved as to form.

WILLIAM J. MADDEN,
Attorney for Plaintiff.

[Endorsed]: Filed May 3, 1948. [29]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS UNDER RULE 73B

Notice is hereby given that Andrew L. Johnson and Charles W. Gunstone, plaintiffs above named, hereby appeal to the Circuit Court of Appeals for

the Ninth Circuit from the Order of Dismissal entered in the above court on the 3rd day of May, 1948.

WILLIAM J. MADDEN,
RYAN, ASKREN &
MATHEWSON,

Attorneys for Appellants: Andrew L. Johnson
and Charles W. Gunstone, 545 Henry Building,
Seattle 1, Washington.

[Endorsed]: Filed May 11, 1948. [30]

[Title of District and Cause.]

APPELLANT'S DESIGNATION OF CON-
TENTS OF RECORD OF APPEAL

To the clerk of the United States District Court:

Comes now the appellants by their attorneys,
Ryan, Askren & Mathewson and William J. Mad-
den, and designate the following pleadings which
they wish prepared for transmission to the Circuit
Court of Appeals in connection with the appeal
heretofore filed in this cause:

1. Plaintiff's original Complaint.
2. Defendant's Answer.
3. Defendant's Motion To Dismiss.
4. Affidavits of Carl H. Wehr, William F. Lally
Samuel J. Reiffel.
5. Court's Memorandum Opinion on the Motion
To Dismiss.

6. Order of Dismissal.

7. Notice of Appeal.

Respectfully submitted,

WILLIAM J. MADDEN,

RYAN, ASKREN &

MATHEWSON,

Attorneys for Appellants.

Copy Received May 17, 1948.

FRANK PELLEGRINI,

By P. CALLAGHAN.

[Endorsed]: Filed May 17, 1948. [31]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

United States of America,

Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages 1 to 31 inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by designation of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at

Seattle and that the same constitute the record on appeal from the Court's decision dismissing the cause of action, said decision being dated April 26, 1948.

I further certify that the following is a true and correct statement of all expenses, cost, fees and charges incurred in my office for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to wit:

Clerk's fees (Title 28, U.S.C. Supp. IV, Sec. 555) for making record:

5 pages at 10c (copies furnished).....	\$.50
25 pages at 40c.....	10.00
Notice of Appeal.....	5.00

Total\$15.50

I further certify that the foregoing amount of \$15.50 has been paid to me by the attorneys for the appellants. [32]

In Witness Whereof I have hereunto set my hand and affixed the official seal of the said District Court at Seattle, in said District, this 28 day of May, 1948.

[Seal]

MILLARD P. THOMAS,

Clerk,

By /s/ TRUMAN EGGER,

Chief Deputy.

[Title of District Court and Cause.]

General Casualty Company of America
Seattle, Washington

BOND FOR COSTS ON APPEAL

Know all men by these presents:

That we, Andrew L. Johnson and Charles W. Gunstone doing business as Johnson & Gunstone, a Co-Partnership, the Plaintiff above named as Principals, and the General Casualty Company of America, a corporation organized under the laws of the State of Washington, and authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto the United States of America, the Defendant above named, in the just and full sum of Two Hundred and Fifty and No/100.....\$250.00) dollars, for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 26th day of April, A.D. 1948.

The condition of this Obligation is such, That,

Whereas, the above named Defendant on the 26th day of April, A.D. 1948, in the above entitled action and court, recovered judgment against the Plaintiffs above named for Demurrer,

And Whereas, the above named Principals have heretofore given due and proper notice that they appeal from said decision and judgment from said

United States District Court to United States Circuit Court of Appeals.

Now, Therefore, if the said Principals, Andrew L. Johnson and Charles W. Gunstone doing business as Johnson & Gunstone, a Co-Partnership, shall pay to the United States of America, the Defendant above named, all costs and damages that may be awarded against them on the appeal, or on the dismissal thereof, not exceeding the sum of Two Hundred Fifty and No/100.....Dollars, then this obligation to be void; otherwise to remain in full force and effect.

ANDREW L. JOHNSON,
CHARLES W. GUNSTONE,
GENERAL CASUALTY

COMPANY OF AMERICA,
By /s/ CLAUDE W. HOUGHTON,
Attorney-in-fact.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest:

MILLARD P. THOMAS,
Clerk U. S. District Court,
Western District of Washington.
By WALLACE W. PETERSON,
Deputy Clerk.

[Endorsed]: Filed DC June 10, 1948.

[Endorsed]: Filed CCA June 12, 1948.

[Endorsed]: No. 11948. United States Circuit Court of Appeals for the Ninth Circuit. Andrew L. Johnson and Charles W. Gunstone, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed June 1, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11948

ANDREW L. JOHNSON and CHARLES W.
GUNSTONE, d/b/a JOHNSON & GUN-
STONE, a Co-Partnership,

Appellants.

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS

1. That the United States District Court had jurisdiction of the case and subject matter by virtue of the Federal Tort Claims Act, Title IV of the

Legislative Reorganization Act of 1946, Public Law 601, 6 U.S.C. Congressional Service 778.

2. That the vessels causing the alleged pollution were not engaged in combatant activities so as to fall under one of the exemptions of the so-called Federal Tort Claims Act.

3. That the United States was not during the month of December, 1945 or during the year 1946 engaged in active hostilities, and that its naval vessels were during those periods engaged in combatant activities so as to cause their activities to be exempted from the provisions of the Federal Tort Claims Act under the provision thereof exempting from the Act any claim arising out of the combatant activities of the military or naval forces or the Coast Guard during time of war.

4. That the claim set forth in the Appellants' complaint is one properly brought in the District Court of the United States under the provisions of the so-called Federal Tort Claims Act.

WILLIAM J. MADDEN,
RYAN, ASKREN &
MATHEWSON,

Attorneys for Appellants.

[Endorsed]: Filed June 11, 1948.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD

Appellants herewith designate the whole record heretofore filed in this Court in this cause as necessary for the consideration of their Statement of Points.

WILLIAM J. MADDEN,
RYAN, ASKREN &
MATHEWSON,
Attorneys for Appellants.

Copy served on United States Attorneys for Appellee June 10, 1948.

WILLIAM J. MADDEN,
Of Counsel for Appellants.

[Endorsed]: Filed June 11, 1948.

